## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: August 7, 2001

TO : Elizabeth Kinney, Regional Director Harvey A. Roth, Regional Attorney

Gail Moran, Assistant to Regional Director

Region 13

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: 24 KT Ironworks 133-3900

Case 13-CA-39282 524-0133-9300 524-8390-7950

This case was submitted for advice as to whether the Employer violated Section 8(a)(3) by terminating four employees after learning that they were illegal immigrants working under false alien registration numbers.

## FACTS

The Employer employs approximately 32 employees engaged in the production of ornamental iron and structural steel.

During the last two weeks of December 2000, six employees (Jose Rangel, Martin Guillen, Pedro Vega, Pedro Hernandez, Florentino Jiminez and Gerado Lopez) joined together on numerous occasions to request a wage increase. In each instance, Employer supervisors told them that company president Kathy Magurno would fire them for seeking a raise. On December 27, the six employees asked to speak to Magurno personally regarding a raise. Later that day, nightshift supervisor Jim Embry terminated Guillen and Lopez. Embry later told Rangel that he, Hernandez, Vega and Jiminez had not been terminated because Embry had only told Magurno that Guillen and Lopez were seeking a raise.

On January 16, 2001, 2 Guillen filed a charge with the Illinois Department of Human Rights (IDHR) alleging that he was terminated discriminatorily because of his status as a U.S. citizen. In his charge, Guillen alleged that Rangel,

 $<sup>^{1}</sup>$  The Region has decided to issue a complaint alleging that the terminations of Guillen and Lopez violated Section 8(a)(1).

<sup>&</sup>lt;sup>2</sup> All dates hereafter are in 2001 unless otherwise noted.

Vega, Hernandez, and Jiminez were illegal aliens. The Employer received notice of the charge on February 16. On March 14, Guillen and the Employer participated in a mediation session regarding the charge. On March 15, the Employer contacted the Immigration and Naturalization Service (INS), allegedly to confirm the work status of Rangel, Vega, Hernandez, and Jiminez. The Employer asserts that it was unable to obtain that information.<sup>3</sup>

Sometime in March, Shopmen's Local 473, International Association of Bridge, Structural, Ornamental and Reenforcing Ironworkers (the Union) commenced an organizing campaign among the Employer's employees. On April 6, Union representative Richard Carlson had a meeting with Employer Vice President Steve Salman during which Carlson demanded recognition of the Union as the employees' representative. Salman refused and asked Carlson who had signed authorization cards. When Carlson refused to answer, Salman told him to tell those employees they could start looking for another job because he would fire any employees who wanted a union.

On April 9, at approximately 9:00 a.m., nightshift supervisor Embry called the seventeen first shift employees together. Embry told the employees that Magurno wanted to know who had contacted the Union. He then told the employees that if the Union was successful in its campaign, Magurno would close the plant and would have the employees' immigration papers inspected. He handed the employees blank sheets of paper and instructed them to write "yes" if they wanted the Union and "no" if they did not, and reminded them that if a majority voted "yes" the plant would close. The employees voted and Embry counted the ballots. A majority of the employees voted "yes." Embry then instructed all the employees present to stand under a security camera.

At 11:00 that day, Embry again called all the first shift employees into his office. He warned the employees that if they joined the Union, health insurance would not be available, seniority would be lost, and wages would

<sup>&</sup>lt;sup>3</sup> There is no evidence that the Employer made additional efforts to secure that information prior to the events of April 9, discussed infra. The Employer asserts that it made repeated attempts to contact INS, but has submitted phone records which do not reflect any calls to INS between March 16 and April 8.

<sup>&</sup>lt;sup>4</sup> There is no evidence that the Employer had knowledge of the campaign prior to this date.

decrease. He told the employees to think about their choice because the Union was coming to show Magurno the cards, and if the Union won, employees who signed cards would be fired. $^5$ 

Later that day, Vega, Hernandez, Rangel, and Jiminez were fired. The Employer asserts that it fired them because it received a "return" phone call from INS agent Mary Ford that morning explaining that their alien registration numbers were false. The Employer has provided phone records for March 15 through April 8, but has failed, despite the Region's requests, to provide them for April 9. It would appear more reasonable to infer, given this refusal to provide phone records and the proximity of this action to the Employer's other unlawful responses to the Union's demand for recognition, that the Employer in fact initiated the call to INS, if there was such a call. 6 The Region has confirmed that the employees' alien registration numbers were false. [FOIA Exemptions 6, 7(C), and 7(D)] Embry or dayshift supervisor Russ Fitch told them on April 9 that "there was no more work for them." The Employer asserts that it informed them they were being terminated because their I-9 forms were invalid and that they "could no longer be employed until they validly completed the I-9 form."

On April 10, the employees arrived at work wearing t-shirts bearing the names of the employees who had been terminated the day before. Salman called a meeting of first and second shift employees and explained that INS had ordered the Employer to fire the four employees because of a charge filed by Guillen. He also told the employees that, because of Guillen, the Employer would have to go over everyone's papers and fire all the employees who were illegal. Salman then told the employees that, if they were upset, they should complain to Guillen and gave them Guillen's address.

On April 16, the Union filed an election petition seeking to represent all production and maintenance

<sup>&</sup>lt;sup>5</sup> The Region has decided to issue a complaint alleging that the Employer violated Section 8(a)(1), including by making threats of termination, threats of plant closure, threats to inspect immigration papers, and threats of reduction of wages and benefits, and by interrogating employees and conducting an illegal poll.

<sup>&</sup>lt;sup>6</sup> The Region has been unable to contact INS agent Mary Ford, but has been told by her supervisor that INS does not keep phone records.

employees employed at the Employer's facility. On May 23, the Union won the election. No objections were filed and a certification of representative issued on June 6.

Although the Region has not yet obtained direct evidence that the Employer knew, prior to the events described herein, that the discharged employees were illegal aliens, [FOIA Exemptions 6, 7(C), and 7(D)] the Employer had long known they were illegal and that most of the employees are illegal.

## ACTION

We conclude that the Employer violated Section 8(a)(3) by pretextually discharging Rangel, Vega, Hernandez, and Jiminez because of their illegal status in order to retaliate against them for their Union activity.

Under <u>Wright Line</u>, the General Counsel must make a "prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision."<sup>7</sup> Once this is established, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."<sup>8</sup>

It is clear that the General Counsel can establish a prima facie case of unlawful motivation here. The Employer has demonstrated its union animus through its interrogations and threats directed at virtually all of the employees. Moreover, the Employer specifically threatened employees that it would inspect immigration papers if the Union was successful in organizing the employees. The discharges took place three days after the Union's demand for recognition and shortly after two meetings wherein the Employer threatened employees with termination, loss of benefits, plant closure, and inspection of immigration papers. 9

<sup>7 251</sup> NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393, 400 (1983).

<sup>8 &</sup>lt;u>Id.</u>

<sup>&</sup>lt;sup>9</sup> The Employer may have chosen to specifically target Vega, Hernandez, Rangel, and Jiminez because those employees were involved in the wage increase requests that preceded the Union activity and/or because they had already been identified by Guillen as illegals. In any event, the Board has held that, even in the absence of evidence that

The Employer has not demonstrated that it would have discharged these employees, absent their union activity, because of their illegal status.

In Regal Recycling, Inc.,  $^{10}$  the employer responded to union activity by demanding that employees show proof of eligibility under IRCA to work in the United States, discharging them when they could not present documentation, and threatening to close the facility if the employees selected a union it opposed. 11 This evidence satisfied the General Counsel's Wright Line prima facie case. The Board then adopted the ALJ's finding that the employer failed to show that it would have discharged the employees in the absence of their union activity. Prior to the employees' support of the union, the employer had not required all employees to furnish proof of their authorization to work. Moreover, there were non-union supporters who failed to produce eligibility documentation who were permitted to continue working, and the employer hired new employees, after the discharges, who did not provide appropriate documentation.

In <u>County Window Cleaning Co.</u>, <sup>12</sup> the General Counsel satisfied its <u>Wright Line</u> prima facie case by establishing that the employer, in response to protected activity, conditioned continued employment on an employee's abandonment of the union and discharged the employee when he refused. The employer's defense that it was required to discharge the employee because he was undocumented failed to rebut the General Counsel's evidence that the employer had known for years that the employee had furnished a counterfeit SSN, and that it was only after the employee expressed support for the union that the employer decided it could no longer retain an illegal alien. <sup>13</sup>

specific employees were targeted because of their union activities, actions against employees in response to union activity and after expressions of union animus create a prima facie case of unlawful discrimination. See Addicts Rehabilitation Center Fund, 330 NLRB No. 113, slip op. at 23 (Feb. 29, 2000).

 $<sup>^{10}</sup>$  329 NLRB No. 38, slip. op. at 1-2 (1999).

 $<sup>^{11}</sup>$  Id. at 3.

<sup>&</sup>lt;sup>12</sup> 328 NLRB No. 26, slip. op. at 15 (1999).

<sup>13 &</sup>lt;u>Id.</u> at 17; see also <u>Victor's Café 52</u>, 321 NLRB 504, 514 (1996) (emphasizing that the employer began adhering to

Here, as in Regal Recycling and County Window Cleaning, there is evidence that the Employer had knowingly hired or retained illegal workers, and only began to enforce IRCA eligibility requirements in response to the employees' union activity. Thus, [FOIA Exemptions 6, 7(C), and 7(D)] the Employer had known about their illegal status, and that most of the employees are illegal. $^{14}$ Furthermore, the Employer did not take immediate action to comply with immigration laws after "learning" that Vega, Hernandez, Rangel and Jiminez may have been ineligible to work in the U.S. A month after receiving notice of Guillen's accusations, the Employer made one phone call to INS, which it states did not answer the question regarding the employees' work status, and then did nothing to investigate their status - including questioning the employees about it - for several weeks. It did not contact INS again until three days after the Union's demand for recognition. Finally, the Employer threatened all of the employees with "inspection of their immigration papers," which implies some awareness that other employees were illegal as well and yet had been permitted to continue working. When employees protested the discharges, the Employer reiterated to them that "because of Guillen" it would have to go over everyone's papers and fire all illegals. On this evidence, it appears that the Employer had been aware of the four discharged employees' illegal status, as well as the illegal status of other employees, and had "turned a blind eye" prior to their engaging in Union activity.

Accordingly, the Region should issue a Section 8(a)(3) complaint, absent settlement.<sup>15</sup>

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immigration laws only after learning that the union had obtained authorization cards from many of its employees).

14 [FOIA Exemption 5

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The Employer's reinstatement obligations should be addressed during compliance proceedings. See <u>County Window</u> Cleaning, supra, slip op. at 18.